



**California  
First-Year  
Law Students'  
Examination**

**Essay Questions  
and  
Selected Answers**

**June 2004**

## ESSAY QUESTIONS AND SELECTED ANSWERS

### JUNE 2004 FIRST-YEAR LAW STUDENTS' EXAMINATION

This publication contains the essay questions from the June 2004 California First Year Law Students' Examination and two selected answers for each question.

The answers received good grades and were written by applicants who passed the examination. The answers were typed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Applicants were given four hours to answer four essay questions. Instructions for the essay examination appear on page ii.

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## **ESSAY EXAMINATION INSTRUCTIONS**

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

You should answer the questions according to legal theories and principles of general application.

## Question 1

Penelope and her friends went shopping at Deals Department Stores (“Deals”). They entered Deals on the first floor and decided to take the elevator to the third floor. Penelope pressed the button for the elevator. While waiting for it to arrive, Penelope chatted with her friends with her back to the elevator door. When she heard the elevator door open, Penelope, without looking, stepped backward into the elevator opening while continuing to chat with her friends. No elevator car was present, she fell into the shaft, and dropped fifteen feet to the basement floor.

While Penelope suffered only minor physical injuries as a result of her fall, shortly thereafter she suffered an acute psychotic breakdown from which she has not recovered. Penelope’s doctors have concluded that the elevator accident aggravated a pre-existing psychological condition which has caused permanent disabilities.

Deals owns the store building and contracts with Reliable Elevator Company (“Reliable”) to maintain the elevator. Reliable also manufactured and installed the elevator. This type of accident involving a Reliable elevator has never happened before and there is no evidence of what caused the elevator car to be out of position when the elevator door opened.

1. Under what theory or theories should Penelope bring an action for recovery of damages for her injuries, and against whom? Discuss.
2. What defenses should be raised and what are the likely results? Discuss.

## ANSWER A TO QUESTION 1

### ① TORTS

#### Penelope v. Deals Department Stores [“Deals”]

##### **Negligence:**

Negligence is a breach of a legal duty that actually and proximately causes damages to another.

##### **Duty:**

A duty is what a reasonable prudent person would be required to do or not do under the same or similar circumstances.

Landowners owe no duty to trespassers but do owe a duty of care to persons they invite onto their land.

##### **Invitee:**

An invitee is a person invited onto the landowner[']s premises for monetary exchange type of business tran[s]actions. A landowner owes the duty to inspect the premises for hidden defects that may pose a danger to the invitee and also owes a duty to repair any defects on the property.

The facts indicate that Penelope and her friends went shopping at Deals. This is a business exchange and therefore she is an invitee. Deal[s] owes her a duty of care as mentioned above.

##### **Breach:**

A breach is the failure to perform a legal duty.

##### **Res Ipsa Loquitor**

“The thing speaks for itself.” When an elevator door opens without the elevator present, it can be said that something went wrong and a breach occurred. The elevator was within Deals['] ability to fix and when this accident occurred the court can imply that he failed to inspect the elevator properly and place the burden on him to prove otherwise. Deal[s] has breached his duty of care.

##### **Causation:**

### **Actual Causation:**

This is the sine qua non or - “but for” cause of the accident. “But for” the elevator not being properly maintained, this accident would have never occurred.

### **Proximate Causation:**

This is the direct or indirect act that caused the accident. Penelope will argue that her injury was a direct result from Deals’ breach. She’ll claim that there were not any intervening, unforeseeable or independent acts.

Deals will argue that Penelope’s not looking as she entered was an intervening act since it occurred after his breach and was unforeseeable.

Deals['] act “set the stage” for the accident and was therefore an indirect proximate cause. Penelope’s not looking is foreseeable since a blind person shopping at Deals was foreseeable as falling as well.

Deals’ breach was an actual and proximate cause of Penelope’s injuries.

### **Damages:**

For negligence, economic loss alone is not sufficient. One must suffer physical damages.

The facts indicated that Penelope sustained “minor physical injuries as a result of her fall.” These are sufficient damages.

### **Result:**

Deal[s] was negligent and will be liable for general and special damages for Penelope[']s injuries as a result of the fall.

Aggravated [sic] injuries: thin-skin Plaintiff.

The courts have established that the defendant is liable for even unforeseeable injuries that result due to the plaintiff’s pre-existing weaknesses. Deal[s] will be liable for the acute psychotic breakdown that caused her permanent disabilities; even though it was unforeseeable and unpredictable at the time of the accident. Penelope can recover general and special damages for her physical disabilities that resulted due to Deals’ negligence.

## **Penelope v. Reliable Elevator Co. “Reliable”**

### **Products Liability - Negligence**

**Duty:** Manufacturers of products owe a duty of care to provide safe products.

Under common law, Penelope would not be in privity of contract and not have the ability to sue Reliable.

However, modernly, MacPherson v. Buick Motor Co. established that manufacturers owe a duty of care to the purchaser and any foreseeable end user.

The facts indicate that Reliable “manufactured and installed the elevator.” Since they installed and even maintained it inside Deals Department Store, they were directly put on notice that any of Deals’ employees or customers were foreseeable users of the product. Penelope as a customer thus has a cause of action since she is owed a duty of care.

**Breach:**

Res Ipsa Loquitor (supra)

Since Reliable was to maintain the product and it failed to operate correctly, a presumption of a breach can be made. Reliable has breached its duty to Penelope.

**Causation: (supra)**

Actual cause can be shown since “but for” it not being properly maintained and inspected, the injury would not have occurred.

Proximate cause can be shown since there was no unforeseeable, intervening or independent act that broke the chain of causation.

**Damages: (supra)**

Penelope has suffered minor physical injuries and a permanent disability.

Reliable will be liable for general and special damages for both due to their negligence.

Due to this not being a newly manufactured good strict liability & warranty [sic] do not apply since any maintenance to the machine would be an alteration or modification of the product.

② **DEFENSES**

**Penelope v. Deal & Penelope v. Reliable**

### **Contributory Negligence:**

Reliable and Deal[s] will argue that by Penelope stepping backwards into the elevator shaft without looking was her contributory negligence that should eliminate or reduce his [sic] liability.

Under common law, a person had to be 100% not negligent to collect. A person's even 1% contributory negligence barred them from any recovery.

Some courts offer "Last Clear Chance" for plaintiffs to eliminate their [sic] contributory negligence. But here, Penelope is not blind and she had the "Last Clear Chance" to avoid her injury simply by looking where she was going.

Under common law, Penelope would not collect for her injuries from Reliable or Deal[s].

Modernly, courts follow comparative negligence. In strict comparative negligence, Penelope can recover 1% of her damage even if 99% at fault. In other jurisdictions, they require that the plaintiff be no greater at fault[,] either 50-50% or 49-51%. Under these jurisdictions, Penelope can collect whatever portion she was not a[t] fault for.

### **Assumptions of the Risk.**

Plaintiff must know and recognize the danger and proceed anyhow.

Here, Penelope's back was turned. It can be assumed that she wouldn't have stepped if she had seen the empty elevator shaft.

Penelope did not assume the risk.

### **Deal[s] v. Reliable**

Deal[s] may attempt to sue Reliable for indemnity.

Deal[s] will claim that since he contracted with Reliable to maintain the elevator that they were responsible to maintain it properly.

Deal[s] will state that he is not responsible as respondeat superior for Reliable since he is not their employer. They can maintain it when they want and can send whatever repairman they want. Thus, they are independent contractors.

Unless Reliable has an indemnity clause in their service contract, Deal[s] can sue them and collect for whatever amount that he had to pay Penelope.

## ANSWER B TO QUESTION 1

### Penelope vs. Deals

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#### Negligence

Penelope will bring an action for negligence against Deals.

Duty - Deals owes a duty to Penelope as a landowner occupier. Deals['] duty is to inspect, warn or make safe any dangerous conditions. This duty is imposed on Deals at this standard because Penelope is considered an invitee. An invitee is one who has consent to enter the landowners['] property and has a pecuniary interest in common with the owner.

Breach - A breach of the duty occurs when the defendant's actions fall below the standard of care owed.

Here the facts tell us that the elevator doors opened without the elevator being present. The defendant['s] failure to inspect the elevator and make it safe breached his duty to Penelope.

Deals could have had ensured by inspecting and placing warning signs to always look before stepping into the elevator.

#### Causation

The defendant will be liable for an injury if he was both the actual and proximate cause of the injury.

Actual Cause - This test is usually referred to as the "but for" test. It can be said that but for Deals['] failure to inspect or make their premises safe, the injury would not have occurred.

Proximate Cause - This test is usually referred to as the foreseeability test. It is foreseeable that an elevator may[, ] for whatever reason, not to [sic] be in position.

Deals will counter that Penelope's act of not looking, before she stepped backwards, is an independent, unforeseeable, intervening act, but this argument [sic] will fail, because it is foreseeable that a customer will be talking with friends and upon hearing the door open step in without looking.

Deals is therefore the proximate cause of the injuries.

Damages - The plaintiff must actually suffer damages to recover for negligence. This does not appear to be an issue, because the facts tell us she was injured.

Contributory Negligence - As stated as a defense to proximate causation Deals will counter

that when Penelope didn't look, before stepping, she contributed to her injury. If this is found to be true she will be barred under a contributory jurisdiction from recovery. A comparative jurisdiction will allow her to recover, with an offset due to [t]he percentage at fault, under a pure[-]comparative. Under a partial comparative, she may recover if she wasn't found more than 50% at fault.

As stated prior this argument [sic] will fail and Deals will be liable for negligence. It should be noted that Deals may be able to obtain indemnity from Reliable. If one does not find negligence as stated supra, res ipsa loquitur discussed infra can be applied here.

### Negligent Infliction of Emotional Distress

The defendant can recover under this theory if she was within the zone of danger, and suffered severe emotional distress.

Since she actually suffered injury due to the negligence, she was in the zone of danger. Also, the facts tell us, she suffered [an] acute psychotic breakdown that is permanent, which will satisfy the element of severe emotional distress and the impact requirement of some jurisdictions.

Deals will counter that he should not be liable because the plaintiff already had a preexisting condition, but this will fail, because you take your plaintiffs as you find them. His attempt to break causation will fail, because he was the actual and proximate as discussed supra.

Deal[s] liable for negligent infliction.

### Penelope vs. Reliable

Penelope will sue Reliable under a products liability theory.

A manufacturer can be held liable under negligence, warranty and strict liability if their product was defective and caused the injury.

### Negligence

A manufacturer is held liable for any injury caused to a foreseeable end user or bystander, due to his negligent design, manufacturing or failure to provid[e] adequate warning.

The case of MacPherson vs. Buick no longer requires privity.

### Res Ipsa Loquitur

The facts tell us that this type of accident has never occurred and that there is no evidence of what caused the elevator to be out of position.

When there is no evidence to support a negligent act, *res ipsa loquitur* is used.

① The accident must be of the kind that does not normally occur absent negligence. Here an elevator doesn't fail to reach it's [sic] destination absent some negligence.

② Also, the cause of the injury must be in the exclusive control of the defendant. Here Reliable was not only the manufacturer, but also responsible for maintaining the product. It will therefore be deemed to have been in his exclusive control.

Reliable may counter that he was not in exclusive control, because Deals would also be in control. This argument [sic] will fail because, as stated, Reliable was responsible for maintaining also.

③ The final element is that the plaintiff did not cause or contribute to the injury. Although Reliable will state that Penelope did cause and contribute to the injury, as discussed in *P v. Deals*, this argument [sic] will fail.

Therefore Reliable will be found liable, under *res ipsa*, but it should be noted that this is just an inference of negligence, to be decided by a jury.

### Warranty

A manufacturer's products come with a warranty of merchantability that they will be safe when used for ordinary purposes. Under *Henningson vs. Bloomfield*, no privity is required.

Here the facts tell us the elevator failed to appear when the door opened. An elevator is suppose[d] to be there, therefore it failed to meet it's [sic] ordinary purpose.

Since it did not appear as discussed *infra* it was the actual and proximate cause and damages resulted.

### Strict Liability

A manufacturer is held strictly liable for any injuries caused to any foreseeable end user or bystander, as a result of a defective product.

Under *Elmore vs. American Motors* no privity is required.

There are no facts to indicate that there was a design, manufacturing or warning defect.

## Question 2

GrainCo, a regional grain distributor, sent an offer to sell ten railroad cars of wheat to Processor. The entire offer is contained on a signed form. The front side of the form contains GrainCo's name and address, along with blank spaces for the description of the goods, quantity, price, and delivery date. The blanks were filled in with the desired information. The following statement appears at the bottom of the front side of the form:

"Any contract resulting from acceptance of this offer shall consist only of those terms appearing on the front and reverse sides of this document."

The reverse side of GrainCo's form has six paragraphs. Paragraph five reads as follows:

"Any disputes arising under this agreement shall be resolved through binding arbitration under the rules of the Commercial Arbitration Association."

Processor responded to GrainCo's offer with its standard acceptance form. Processor's form contains its name, address, and company logo embossed at the top of the page with the words "Purchase Order" just below. It has blank spaces for the description of the goods, quantity, price, and delivery date, which Processor filled in with information matching the information on GrainCo's offer. Processor's Purchase Order form has five paragraphs on the back. Paragraph five states:

"The laws of the State of California shall govern this agreement and any claims or controversies arising during performance shall be resolved through proceedings in the courts of the State of California."

Processor's Purchase Order form has a signature line at the bottom of the front side, but due to a clerical error the form sent to GrainCo was not signed. Soon after receiving Processor's Purchase Order form, GrainCo purchased ten railroad cars of wheat from local suppliers for shipment to Processor.

1. Assume that before any wheat is shipped to Processor, the price of wheat falls sharply. If Processor informs GrainCo that it will not accept the ten railroad cars of wheat, will Processor be liable to GrainCo for breach of contract? Discuss.
2. Assume instead that GrainCo delivers the ten railroad cars of wheat to Processor, and Processor pays to GrainCo the full contract price. If Processor has a complaint about the quality of the wheat it received, must Processor submit its claim to the Commercial Arbitration Association? Discuss.

## ANSWER A TO QUESTION 2

2)

### GrainCo v. Processor

#### UCC governs

Under contract law, the UCC governs the sale of goods, moveable property identified at contract formation. Here, the contract was for the sale of ten railroad cars of wheat and therefore the contract was for the sale of goods and the UCC applies.

#### Merchants

Under the UCC, a merchant is one who trades in or otherwise holds himself out as knowledgeable about the goods. Here, GrainCo is a regional grain distributor, and Processor processing the goods. Therefore, both parties are merchants.

#### Writing required

Under the Statute of Frauds, a writing is required for the sale of goods over \$500. Here, if the sale of 10 railroad cars of grain exceeds \$500, a writing is required.

#### Formation

Under contract law, the rights and remedies of the parties depend on whether a valid contract has been formed. A valid contract consists of mutual assent (offer and acceptance) and consideration.

#### Offer

An offer is a[n] outward manifestation of a present intent to be contractually bound, creating a power of acceptance in the offeree, and containing certain and definite terms. Here[,] GrainCo sent a written offer and the entire agreement was contained on a signed form. Therefore, the form was an outward manifestation with intend[sic] to be bound creating a power of acceptance in the offeree which did in fact create a power of acceptance in the offeree.

At common law, the offer had to contain quantity, time for performance, parties, price, and subject matter. Modernly under the UCC, quantity is sufficient[;] all other terms can be ascertained by course of dealings, course of performance, trade usage or gap fillers. Here, the offer contained goods, quantity, price and delivery date. Since quantity is sufficient, we have certain and definite terms.

#### Acceptance

Acceptance is the unequivocal assent to the terms of the offer. At common law, the acceptance had to be the mirror image of the offer. Under UCC 2-201, additional or different terms may be included unless the offeror expressly limits the contract to the terms in the offer, the offeree objects within 10 days, or the acceptance alters a material term. Here, the offer stated that "any contract resulting from acceptance...shall consist only of those terms appearing on the front and reverse sides of this document". Under the UCC, and since the parties are both merchants, this state expressly limits the terms to the terms of the offeror and hence GrainCo's arbitration clause would prevail. Without the terms clause, any terms that are not the same as the original offer would be knocked out. Processor's acceptance was printed on a standard form and mirrored GrainCo's offer with the exception that Processor's Purchase order also had a controversies paragraph on the back stating that "The law of the State of California shall govern this agreement and any claims or controversies arising during performance shall be resolved through proceedings in the courts of the State of California". Processor's different terms regarding disputes will not become part of the contract since the offeror expressly limited the contract to offeror's terms.

### **Consideration**

Consideration is that which is bargained for and given in exchange for a current exchange. It can be an act, forbearance to act, or return promise resulting in legal benefit or legal detriment. Here, GrainCo's receiving the grain is his legal detriment and Processor receiving the grain is Processor's legal benefit. GrainCo's receipt of money for the grain is his legal benefit and Processor's promise to pay for the grain is Processor's legal detriment. Therefore, we have a valid consideration and a valid contract.

### **Statute of Frauds Defense**

Statute of frauds requires a writing for a contract for the sale of goods for \$500 or more. The facts don't state a specific amount. Here, if the contract was for less than \$500, no writing is required. Assuming the contract was for more than \$500, then a writing is required. Under the UCC, a writing requires a signing by the party to be charged and quantity. Processor's acceptance form included a quantity term but due to a clerical error did not contain a signature. The form[,] however, did contain its name, address and company logo on the top of the page with the words "Purchase Order". Courts have held that this is sufficient since it can be implied that there was a meeting of the minds and an acceptance by Processor since their Purchase Order contained the name of the party to be charge [sic], Processor filled out the form and sent it. Additionally, since the lack of signature was a clerical error, courts will tend to allow reformation for a unilateral mistake on behalf of the non-mistaking party. Here, processor's mistake to not sign the form was unilateral so the courts will tend to enforce the contract against the non-mistaking party which is GrainCo. Therefore, the Statue [sic] of Frauds will be no defense and the contract will be enforceable.

If the courts were to allow the status [sic] of frauds as a defense, GrainCo could collect damages from Processor since GrainCo detrimentally relied on Processor's acceptance and purchased 10 carloads of wheat.

### **Anticipatory repudiation (Question 1)**

Anticipatory repudiation occurs when a party communicates that they unequivocally will not perform. Here, the price of wheat fell and Processor informed GrainCo that it would not accept the ten railroad cars of wheat. Under the UCC, the terms of a contract can be modified in for [sic] a good faith reason. Here, both parties assumed the risk of the price of wheat fluctuating. An increase of price is no defense to contract formation. Both parties are merchants and deal in the product and know or should know that there is a probability of price fluctuations. When Processor stated that is[sic] would not accept the wheat, GrainCo has the right to immediately stop performance, mitigate his damages and try to sell the wheat to another party, and sue Processor because Processor has breached his absolute duty. Processor may assert the Statute of Frauds Defense (supra), but will not prevail.

### **Performance (Question 2)**

Under the UCC, a buyer that receives nonconforming goods may reject the shipment, or accept the shipment and collect damages for the difference between the goods if they had been of the quality specified by the contract minus the price of the goods as accepted. A writing[,] however, can specify terms different from the UCC. Here, GrainCo had an arbitration clause that required disputes to be settled through the rules of the Commercial Arbitration Association (see Offer supra). Processor's form indicated resolution through the courts of California. Since GrainCo's form expressly limited the contract to the terms in the original offer[,] Processor must submit its claim to the Commercial Arbitration Associations.

### **Breach**

Failure to perform a duty that has become absolute through satisfaction, excuse or discharge. Here, Processor's duty became absolute upon offer, acceptance and consideration absent any defenses. When Processor antipatorily [sic] repudiated the contract, he breached his duty and is liable to GrainCo for damages consisting of the cost of the contract minus any monies GrainCo would receive from mitigating.

## ANSWER B TO QUESTION 2

### Grainco v. Processor

#### Which law governs?

The sale of goods are governed by Uniform Commercial Code. Here the subject matter is wheat[,] which is a tangible item. Hence UCC will be governing law.

#### Are Parties Merchants?

Merchants are parties who are regularly engaged in the dealing of a good or who hold themselves out as having special knowledge in the subject matter of the contract.

It appears from the fact that Grainco and Processor are in regular business of dealing in wheat and as such will be considered merchants.

#### Is there a contract?

In order to find a legally enforceable agreement, there should be certain elements present[:] namely, a valid offer, a valid and timely acceptance and consideration. We will discuss these items one by one as follows:

##### Offer:

An offer is an outward manifestation of the desire of a party to enter into a contractual relationship. An offer should have three components[,] i.e.

**Intent** - The party making an offer should demonstrate an intent to enter into a present contractual relationship in such a way that the person to whom such offer is made should reasonably understand that power of acceptance has been bestowed upon them.

**Content** - The offer should contain essential items of the offer[:] namely identification of the parties, price, subject matter and time of performance.

**Communication** - Such intent and contents should be clearly communicated to the offeree so as to make a reasonable person understand that an offer has been extended giving him power of acceptance.

In the instant case, we are told that Grainco sent a written offer to sell ten carloads of wheat to Processor. This offer was written on a signed form which identified parties, subject matter quantity, price and delivery date. It clearly communicated an intent to commit should such offer be retur[n]ed with due acceptance by Processor.

Hence we can conclude that there was a valid offer made.

## **Acceptance:**

Acceptance is the clear and unequivocal assent to each and every term of the offer, given by the offeree in the manner & time prescribed by the offer or in absence of such stipulations conveyed in a reasonable manner within a reasonable time or until the offer does not lapse or is not revoked.

Here we see that Processor returned Grainco's offer with their acceptance using their standard acceptance form. The offer had not been revoked up to the time they accepted. The acceptance identified the parties, the price, the subject matter and also stated the terms.

Hence we can conclude that their [sic] was a timely acceptance.

## **Additional[]/Conflicting Terms:**

Since the governing law is UCC, "Mirror Image Rule" of common law is not applicable.

UCC allows acceptance in any reasonable form with any additional terms not being fatal to contract formation as long as those additional terms do not fall in one of the following categories:

1. Materially change the contract
2. Make the formation entirely contingent upon the acceptance of the terms of the acceptance
3. Are objected to by the offeror within reaso[n]able time.

Under the UCC, additional terms which do not materially alter the terms of the offere [sic] become part of the contract if not objected to by the offeror. However, the terms which materially alter the terms of the contract are to be expressly consented to by the offeror in order to become part of the contract.

UCC handles conflicting terms in the following manner:

**Knock Out Rule:** Conflicting terms are self[-]cancelling and the contract is reduced to the terms which are not conflicting each other.

**UCC Gap fillers:** UCC provide gab [sic] fillers which will replace the conflicting terms with the standard terms provided by UCC.

In the instant case, we see that GrianCo [sic] had made it a condition that the acceptance will be only on the terms printed on their offer/sale form. Paintco's form,

though[,] contained a conflicting terms [sic] concerning issues of dispute which may arise later on, did not stipulate that the formation of contract will be conditional on acceptance of their terms.

However, since there is conflict, a court may find the conflicting terms self[-]cancelling and may insert standard UCC gap fillers.

### **Consideration:**

Consideration is defined as bargained for exchange of legal detriment. In [sic] can be in two forms:

1. Promise by each party to do what they were not obligated to do absent the contract.

2. Forbearance to act which they were entitled to act absent the contract.

Here, we see that GrainCo has agreed to supply grain and Processor has agreed to pay the money.

Hence proper consideration is available and is not fatal to contract formation.

### **Absence of Signature:**

The formation of contract is dependent on valid Offer, Acceptance & Consideration as well as parties['] intent to enter into the contract.

Absence of signature will not be fatal to the formation of the contract as long as parties desired to enter into the contract and met the essential elemental requirement to form the contract.

### **Statutes of Fraud:**

Concerning sale of goods contract, if the value of goods is over \$500.00, such contract is required to be in writing.

Here we see that parties made the offer and acceptance in writing on their standard stationery. Such stationery clearly identified the parties involved, subject matter of the contract, price, date and place of delivery[,] etc.

Hence we may conclude that the SOF requirement was met.

### **Anticipatory Repudiation:**

While the contract is executory on both sides, i.e.[,] neither party has rendered

performance under the contract, anticipatory repudiation is said to have occurred if one of the parties, unequivocally and clearly express intention that they will not perform their duties, the aggrieved party is faced with anticipatory repudiation.

Here we see that GrainCo has not yet shipped when Processor notified G that they will not pay for the grain. This refusal to pay was due to the changed market conditions. Since G has not yet performed, i.e., they have not yet shipped the grain, we may conclude that the contract is still executory on both sides. Hence, G is not faced with AR from P.

UCC offers following options to the party faced with AR:

1. Consider this a present breach and sue immediately.
2. Wait for the due date and sue if performance not rendered when due.
3. Disregard AR and demand assurances.

G has an option to consider P in breach and sue for damages immediately. His obligations under the contract will be immediately discharged.

### **Is there a Breach:**

Breach occurs when the performance is not rendered when due.

Here, we are faced with the situation of AR per discussion above. If G elects that they will be considered [sic] AR as breach, P will be found to have breached his duties.

We are faced with the breach of contract by P.

### **Defenses by P:**

P may try to raise following defenses:

#### **No Contract Formed:**

P may try to establish that there was no contract formed because of the following:

1. Purchase Order not signed -

P may argue that since the purchase order required signature and was not signed, there was no contract formed.

This argument will not hold since it was P who failed to sign [sic] and cannot claim the benefit of his own mistake. Moreover, it was clear from P's actions that they had accepted G's offer when P filled out their standard form with what they were offered on G's offer form. Courts look at the intent of the parties. Here the SOF requirements were met and parties clearly intended to enter into a contract.

This defense will fail.

## **2. Conflicting Terms:**

P may argue that due to conflicting terms in the purchase and sale order, no contract was formed.

Under UCC additional terms do become part of the contract unless they materially change the contract. Such conflicting terms may either be accepted by the offeror and become part of the contract or they may self[-]cancel each other and UCC's standard gap fillers come into play.

This defense will also fail.

## **3. Impracticability:**

P may argue that due to market fluctuation, it is commercially unconscionable to hold him to the agreement he made. It will be commercially fatal for him to purchase the grain at such a high price.

**Equitable Estoppel:** The courts may use the doctrine of equitable estoppel, where it can be shown that P's acceptance was foreseeable to cause justified reliance by G and it would render G impoverished due to the steps he took to fulfil his contractual duties.

We are told that as soon as G received P acceptance form, G purchased the grains. If P now refuses to accept and pay for them, G will be unjustly impoverished and the court may find that the only way injustice can be avoided would be to hold P for the promise he made.

The court may find P in breach and will allow recovery to G.

## **What can be recovered:**

In cases of breach, following interests can be recovered;

### **Expectation Damages:**

Where both parties have not performed, the aggrieved party may be able to recover the benefit of the bargain and may be put in the situation as if the contract would have been carried out.

Here G may be able [to] recover the contract price minus what they save by not having to perform.

### **Reliance Damages:**

Where aggrieved party has partly performed and the other party breached, they may be able to recover the expense incurred and losses sustained by letting other opportunities pass by.

Here G may be able to recover the expenses they incurred and any lost sales due to commitment from P.

### **Restitution Damages:**

It is applicable where aggrieved party has fully performed and the other party breaches.

The aggrieved party may be able to recover the full value of his performance not limited by the cost.

Since here, G had not performed when P repudiated, restitution damage will not be applicable.

## **Processor v. Grainco**

### **Additional or Contradictory Terms:**

Please see discussion concerning UCC rules on additional or contradictory terms in the offer v. acceptance supra.

In the instant case, we know that G had made it clear that conditions stated on their forms will govern. P sent their own acceptance form which contained contradictory term. From the facts given to us, we see that G never expressly consented to the additional or conflicting term.

A court may rule in following manner:

1. It may consider that the additional or contradictory term did not become part of the contract since it was never expressly consented to. In that case P will have to submit to Commercial Arbitration Association.

2. The court may consider both terms self[-]cancelling and will apply UCC Provision. In that case UCC provision will hold and P may not be bound by the provision in G's form.

### Question 3

After drinking heavily, Art and Ben decided that they would rob the local all-night convenience store. They drove Art's truck to the store, entered, and yelled, "This is a stick-up," while brandishing their unloaded pistols. They discovered that the only persons in the store were Mark, who worked at the store, and Fran, a customer. Art became enraged, since he regarded Fran as his steady girlfriend and was jealous that she had been spending time with Mark. Art announced, "We'll chill these lovers out," and loaded them into the truck. Art drove a very short distance down the dirt road behind the store to a large refrigerator. Art locked Fran and Mark in the refrigerator. Art then returned to the store to pick up Ben, who took \$250 from the cash register on his way out of the store.

The next day, the store manager saw that things were amiss and called police, who rescued Fran and Mark from the refrigerator. Fran suffered no significant injury, but Mark soon developed pneumonia and died as a result of it several weeks later. The coroner's report showed that Mark had an extraordinary susceptibility to pneumonia and that it was triggered by exposure to the combination of viruses and the intense cold of the refrigerator.

1. What criminal charges, if any, should be brought against Art and Ben? Discuss.
2. What defenses, if any, do Art and Ben have to the criminal charges? Discuss.

## ANSWER A TO QUESTION 3

### State v. Art

#### Conspiracy

An agreement between two or more persons to commit a crime.

Art and Ben decided to rob the local convenience store. This decision, mutually made, constituted an agreement. Art had both the intent to agree at the time the agreement was formed, and also the intent to commit the criminal act, satisfying the *mens rea* requirement for conspiracy.

Therefore, Art will be guilty of conspiracy.

#### Pinkerton's Rule

Under Pinkerton's rule, a defendant is guilty of all crimes foreseeably carried out in furtherance of the conspiracy. Therefore, though Art did not actually commit a larceny, larceny was a foreseeable crime, given the nature of the conspiracy, and Art will be guilty though he did not actually commit the act.

#### Attempted Robbery

Attempt is a substantial step towards the perpetration of an intended crime.

Robbery is the taking of personal property by force or threat of force from the person of the victim.

Art, with the specific intent to rob the convenience store, took an unloaded pistol and went to the store, proclaiming that it was a robbery. He will argue that the pistol was unloaded, and that he therefore did not use force; however it will suffice for the threat of force requirement for burglary and the apparent ability test for attempt. Art was apparently able to rob the store. In addition, it was both legally and factually possible to rob the store, and Art was in the process of perpetrating the crime.

Therefore Art will be guilty of attempted robbery.

#### Assault

Assault is either a substantial step towards the perpetration of an intended battery, or the intentional placing of another in reasonable apprehension of imminent bodily harm.

Art went into the store with a gun, pointing it at the people inside. This constituted a conditional threat, not an imminent threat of battery, and therefore would not constitute

an assault.

However, Art went further than this, loading Mark and Fran in the truck. It is reasonable to infer that both Mark and Fran were placed in apprehension of this battery before it occurred, and in addition, Art committed a substantial step towards perpetration of the intended battery.

Therefore Art will be guilty of assault.

### **Battery**

The unlawful application of force to the person of another.

Art loaded Mark and Fran into the truck. He had no legal authority to do so, and his application of force was therefore unlawful.

Therefore Art will be guilty of battery.

### **Merger**

Though Art is guilty of both assault and battery, assault is a lesser included offense to the battery, and therefore the state will only obtain a conviction on one or the other crime.

### **False Imprisonment**

The unlawful confinement of another, within fixed bounds, for any period of time.

The state would bring two counts of false imprisonment against Art. First, he loaded Mark and Fran into the truck. They had no reasonable escape, and were confined against their will without legal authority.

Second, Art placed Mark and Fran into the refrigerator. They could not get out, and were subjected to the cold temperatures until rescued, hours later.

Therefore, Art will be guilty of false imprisonment.

### **Kidnapping**

The intentional confinement and asportation of another.

Art confined Mark and Fran in the back of the truck, as discussed supra. In addition, he drove them down the road.

Art could argue that, because he did not drive them very far, he did not asport Mark and Fran. However, asportation takes merely the slightest movement once the victim has

been confined. Therefore the short drive was sufficient.

Therefore Art will be guilty of kidnapping.

## **Murder**

Homicide committed with malice aforethought.

## **Homicide**

The killing of a human being by another human being.

Art subjected Mark to the cold of the refrigerator, which led to Mark's death by pneumonia.

## **Actual Cause**

But for the actions for Art, Mark would not have gotten pneumonia and died.

## **Proximate Cause**

It is foreseeable that placing a person in a refrigerator will result in his sickness, and possibly death.

Art would argue that the susceptibility of Mark to pneumonia constituted an intervening cause that would break the chain of guilt. However, to be sufficient for an intervening cause, the condition cannot be pre-existing. Mark's susceptibility was in existence before being placed in the refrigerator, and is therefore not an intervening cause.

## **Malice**

The prosecution can prove malice in any one of four ways: 1) Intent to kill; 2) Intent to cause serious bodily harm; 3) A depraved heart act; or 4) The felony murder rule. In this case, the prosecution will argue intent to cause serious bodily harm, the depraved heart act, and the felony murder rule.

1. Intent to Cause Serious Bodily Harm. Intent is either desire to bring about a particular result, or knowledge to a substantial degree of certainty that such a result will occur. The prosecution will argue that Art knew that serious bodily harm was likely to occur by placing two people in a refrigerator. Art would argue that the substantial certainty did not rise to the level necessary. A jury would have to decide, but it is likely that a jury would agree with Art.

2. A Depraved Heart Act. The defense would argue that, even if Art's actions did not rise to the level of intent, they were severely reckless in regards to the safety of

Mark and Fran. The prosecution is likely to succeed in its recklessness contention.

3. The Felony Murder Rule. The prosecution will argue that the death occurred in the perpetration of an inherently dangerous felony. Art and Ben were still in the *res gestae* of the attempted robbery, having not [sic] reached any place of temporary safety, and Art was also committing the felony of kidnapping. Both robbery and kidnapping are inherently dangerous felonies for the purpose of this rule.

### First Degree Murder

Murder premeditated and deliberated with the specific intent to kill, murder by the felony murder rule, or murder by bomb, torture, ambush, or poison.

As discussed supra, the prosecution will argue that this murder was under the felony murder rule. They are likely to succeed in this argument, and therefore this murder will be made murder in the first degree.

### Second Degree Murder

All murders not first degree.

If the prosecution is unable to prove that the felony murder rule applies, they will fall back on the depraved heart act requirement, and the murder will be second degree.

### Voluntary Manslaughter

Homicide with malice, but with adequate provocation or mistaken justification.

Art will argue that seeing his girlfriend with another guy constituted adequate provocation. To be successful, Art would have to argue four things:

1. He was actually provoked. Art was jealous when he saw his girlfriend with another guy. However, he would have to show that this provocation made him act in the heat of passion, not under calm will. Because he was so enraged, it is likely that Art would be able to prove this point.

2. A reasonable person would have provoked. Art is unlikely to be able to show that a reasonable person would be provoked by seeing a girlfriend in a store with someone that worked at the store. The facts give us no indication that there was any reasonableness to Art's jealousy.

3. He did not cool off. Art acted immediately after he became enraged. He did not cool off.

4. A reasonable person would not have cooled off. Because the actions were immediate, a reasonable person probably would not have cooled off.

Because a reasonable person would probably not have been so enraged as to act in the heat of passion, this murder will not be mitigated to voluntary manslaughter.

### Involuntary Manslaughter

Homicide without malice, but with criminal negligence or under the misdemeanor manslaughter rule.

If the prosecution is unable to prove malice, they will fall back on involuntary manslaughter.

Therefore, Art is probably guilty of first degree murder.

### **Accomplice Liability**

The state will also argue that Art acted as an accomplice to Ben's larceny, to be discussed infra. Art acted as a facilitator and aider of Ben's larceny, and will therefore be an accomplice.

### **Defenses**

#### Voluntary Intoxication

Art had been drinking heavily before the crimes were committed. Because this is voluntary intoxication, it will only serve as a defense if it can negate the *mens rea* of the crime. Therefore it will not apply at all to battery, being a general intent crime, or to murder under the depraved heart act or felony murder rule, unless it knocks out one of the felonies.

However, Art will argue voluntary intoxication for the remaining strict liability offenses. He will have to show that the intoxication actually overcame his specific intent. Based on the facts, it is not likely that Art would be able to prove this. He was cognizant enough to become jealous and enraged, indicating that he could think in a rational way, despite the drinking.

Therefore this defense will not absolve Art of culpability.

#### Diminished Capacity

In a minority of jurisdictions, the defendant will be acquitted if some action or insane impulse diminished his capacity to reason and think through his actions. Because, as discussed supra, Art was still apparently able to reason cognizantly, this defense will not apply.

Therefore this defense will not absolve Art of culpability.

## State v. Ben

### Conspiracy

Defined supra.

Ben entered the same agreement discussed supra, with the requisite intent.

Therefore Ben is guilty of conspiracy.

### Pinkerton's Rule

Ben did not actually commit the crimes of kidnapping or false imprisonment. However, these crimes are all reasonably foreseeable in perpetration of a conspiracy to commit robbery, and Ben will therefore be guilty of them.

### Robbery

Defined supra.

Ben entered the store waving a gun and demanding money. However, he did not actually take the money until Mark and Fran had been locked in the refrigerator. To constitute robbery, the taking must be from the person of the victim, which was not the case here.

The state could argue that, because the victims were forcibly removed from the scene of the crime, there was a constructive taking from the person of the victim. However, the state is not likely to succeed in this argument, because the taking and the victim were so far removed.

Therefore Ben is not guilty of robbery.

### Attempted Robbery

Defined supra.

Ben, in participating in the same actions as Art did, will be guilty of this crime in the same way. The discussion, supra, is applicable here.

Therefore Ben is guilty of attempted robbery.

### Larceny

The trespassory taking of the personal property of another, with specific intent to permanently deprive the owner thereof.

Ben grabbed money on the way out, intending to keep it permanently. He had no claim of right to the money, and his taking was therefore trespassory.

Therefore Ben is guilty of larceny.

### **Mispris[i]on**

Failure to report the known felonious conduct of another.

While Art was out kidnapping Mark and Fran on his trip to the refrigerator, Ben was left alone in the store. He knew of the felonious conduct of Art, and did not report it.

Therefore Ben is guilty of mispris[i]on.

### **Murder**

#### Homicide

Defined supra.

Actual and proximate cause discussed supra.

#### Malice

Defined supra.

The prosecution will argue the felony murder rule against Ben. The murder of Mark, as discussed supra, occurred in the commission of an inherently dangerous felony. Under the felony murder rule, all co-felons are equally guilty. Ben was a co-felon in the attempted robbery and an accomplice to the kidnapping, and therefore the prosecution will be able to show malice.

#### First Degree Murder

Defined supra.

This murder will be first degree, as based on the felony murder rule. Therefore Ben will be guilty of first degree murder.

### **Accomplice Liability**

Though Ben did not actually commit the crimes of kidnapping and false

imprisonment, he was an accessory to them as a co-felon. He will therefore be held to be guilty of these crimes.

### **Defenses**

Ben will argue the same defenses to his crimes as Art would. It is likely that his defenses would fail, because he seems to be acting in full awareness of what he is doing.

## **ANSWER B TO QUESTION 3**

### **Question 1**

#### **State v. Art (A) and Ben (B)**

#### **Conspiracy to commit robbery**

Conspiracy is an agreement b/n 2 or more people to commit an unlawful act.

At common law, conspiracy is complete upon agreement. Here, there is an agreement b/n A and B, as facts show A and B decided to rob the local store. As such, there is a conspiracy at common law.

Modernly, a conspiracy is shown through an overt act. Here, A and B entered the store and yelled "This is a stick up" with pistols, which is an overt act. As such, there is conspiracy modernly.

#### **Pinkerton rule**

Under the Pinkerton rule, a coconspirator is liable for the acts of the other that are foreseeable and in furtherance of the conspiracy. As such, A and B would be liable for the acts of the other that are foreseeable and in furtherance of the conspiracy to commit robbery.

#### **Burglary of store**

At common law, burglary is the trespassory breaking and entering of a dwelling house at nighttime with the intent to commit a felony therein.

The state will not find a common law burglary, b/c there was no breaking by A and B, as facts state the all-night store was open for business, and there is no dwelling house, since it was a convenience store.

#### **Modern burglary**

Instead, the state will show there was modern burglary, which does not include a breaking, dwelling house, nighttime, or felony.

Here, there was a trespassory entry by A and B, since they did not have the consent of the store's owner to rob the store, and the facts state they entered the store. There was a structure, as a store is deemed to be a structure. There was the intent to commit a crime, robbery.

As such, A and B are guilty of modern burglary.

## **State v. A**

### **Kidnapping/re: Fran (F) and Mark (M)**

Kidnapping is false imprisonment with movement. (False imprisonment is the confinement of a person by another with the victim's consent).

There was a confinement by A, of F and M, without their consent, as facts state he locked them in a refrigerator and the facts do not show he had their consent to do so. The confinement of F and M was with movement, as facts show he moved them from the store into his truck.

As such, A is guilty of kidnapping.

### **Pinkerton/B's liability**

Since the act of kidnapping was not foreseeable and in furtherance of the conspiracy to rob, as facts show A was jealous of F and M and decided to kidnap them, B will not be liable for F's act under Pinkerton.

### **Battery of F and M**

Battery is the harmful or offensive touching to the person of another.

Since the facts state A loaded F and M into his truck, there is an offensive touching by A.

A is guilty of battery.

### **Pinkerton/B's liability**

Since the act of A's battery was not foreseeable and not in furtherance of the conspiracy to rob, B will not be guilty [sic] of A's act under Pinkerton.

### **Homicide of M**

Homicide is the killing of one person by another. Here, there is a killing of M, since the facts show he died from being locked in the refrigerator by A. However, there may be an issue as to causation since it is not clear whether M was killed by being locked in the refrigerator or due to his susceptibility to pneumonia.

### **Actual cause**

But for A locking M in the refrigerator, M would not have died. A is the actual cause of M's death.

#### Proximate cause

A foreseeable consequence of A's locking M in the refrigerator is that M would die.

#### Intervening act

A will assert there was the intervening act of M's susceptibility to the pneumonia.

However, M's susceptibility to pneumonia would be considered foreseeable and not superseding, since a person's condition of susceptibility to certain things is foreseeable. As such, A is the proximate cause of M's death.

#### Murder/2nd degree murder of M

The state's best charge against A is to charge him with 2<sup>nd</sup> degree murder of M. The felony murder rule will not attach here, since the killing of M was not independent of the inherently dangerous felony, kidnapping, as facts state A was upset at M and F and decided to "chill these lovers out".

Murder is homicide plus malice aforethought.

The state will show malice aforethought through the following:

#### Intent to kill/Intent to cause serious bodily harm

The state will argue that A had the intent to kill, as facts state he stated "We'll chill these lovers out" and proceeded to lock M in the refrigerator, and left him in there for good.

However, A will counter argue that he did not have the intent to kill, since he locked M in a refrigerator, which is not as cold or deadly as a freezer [sic], and he merely was upset at F and M and decided to lock them up.

The state will rebut and state that even if A did not manifest an intent to kill, then certainly locking a person inside a refrigerator, with no breathing holes, and intense cold temperatures manifests an intent to cause serious bodily harm.

Thus, more facts are needed to ascertain whether A had an intent to kill, and the state will show A's intent to cause serious bodily harm.

#### Wanton and reckless

Wanton and reckless is an extreme indifference to the value of human life. Locking a human inside a confined space such as refrigerator [sic] with no way of getting out exhibits an extreme indifference to the value of human life. As such, A was wanton and reckless.

Thus, the state will find A guilty of 2<sup>nd</sup> degree murder of M.

### **Voluntary manslaughter/sudden heat of passion**

The defense will mitigate A's 2<sup>nd</sup> degree murder charge down to voluntary manslaughter via sudden heat of passion.

#### **Sudden heat of passion**

The state will show the following:

The defendant acted from passion rather than reason, as facts state A was upset that F, as his steady girlfriend, had been spending time with M, and saw M and F together at the store, when he became enraged and locked them in the refrigerator.

A reasonable person would act from passion rather than reason, as a reasonable person would become enraged if his girlfriend was caught spending time with another man, and that man was someone the person was already suspicious about in the first place.

There was no cooling off time b/n the passion and the killing, as facts state A became enraged upon seeing F and M together and proceeded to kidnap and lock them in the refrigerator.

As such, the state will successfully mitigate down to voluntary manslaughter via sudden heat of passion.

A is guilty of voluntary manslaughter.

### **Pinkerton/B's liability**

Since the act of A's killing of M was not foreseeable and not in furtherance of the conspiracy, B is not guilty of voluntary manslaughter of M.

### **Attempted murder of F**

#### **Specific intent**

At issue here is whether A had the specific intent to kill, as facts do not demonstrate A wanted to kill F. However, locking one in refrigerator [sic] under cold temperatures would manifest an intent to kill.

A had the apparent ability to kill, as facts state A locked F inside the refrigerator. A was dangerously close to perpetration, as opposed to preparation state, as facts state F was locked inside by A[.] It was only factually impossible as opposed to legally impossible for A to kill F, since F was rescued the next day but would have died if she were not rescued.

As such, A is guilty of attempted murder.

### **Pinkerton/B's liability**

Since the act of A's attempted murder was not foreseeable and not in furtherance, B is not guilty of attempted murder under Pinkerton.

### **State v. B**

#### **Robbery of store/\$250**

Robbery is larceny plus force or intimidation.

There was force/intimidation, as facts state B brand[is]hed a pistol while yelling "This is a stick up".

Larceny is a trespassory taking and carrying away of the personal property of another with the intent to deprive permanently.

There was a trespassory taking and carrying away, as facts state B took and carried away \$250 without the consent of store's owner. The money was the personal property of another, since the facts state it was in the cash register and belonged to the store. B had the intent to deprive permanently, as facts state he left the store w/the money, thus depriving the store of the money permanently.

As such, B is guilty of robbery.

### **Pinkerton/A's liability**

Since the act of B's robbery was foreseeable and in furtherance of the conspiracy to commit robbery, A will be guilty of robbery.

## **Question 2**

### **Defense by A and B**

The only defense available to criminal charges of A and B is to assert intoxication, b/c it negates the requisite specific intent.

### Intoxication

A and B will argue that they should be acquitted of the abovementioned crimes (except A's battery charge), since they are all specific intent crimes. A and B will assert that they were heavily intoxicated and could not form the specific intent to commit these crimes, as facts state they committed these crimes after drinking heavily.

However, the state will argue that A and B were not intoxicated to the point that they could not form the requisite specific intent to commit these crimes, since the facts show A and B were still able to drive to the store to rob it and get away, and A was able to drive the truck to another location during the robbery to confine F and M in a refrigerator.

As such, A and B's intoxication defense fails and A and B will be charged with the abovementioned crimes.

## Question 4

Carol stopped her car at the entrance to her office building to get some papers from her office. She left her car unlocked and left the ignition key under the car's front floor mat while she went briefly into her office.

While Carol was gone, Peter entered Carol's car, found the ignition key where he had seen her leave it, and started the car, intending to drive it to the hospital where his spouse had just been taken for emergency treatment. After Peter had driven the car for about a block, the brakes failed, the car hit a tree, and Peter was injured. In a dazed condition from the accident, Peter entered a nearby public building and pulled the lever of an emergency fire alarm. A city fire truck, responding to the alarm, hit and seriously injured Carol as she was emerging from her office building.

What claims, if any, do Carol and Peter have against each other, and what defenses, if any, may each assert? Discuss.

## ANSWER A TO QUESTION 4

4)

### PETER v. CAROL

#### 1) ISSUE - NEGLIGENCE?

Under tort law, negligence is a failure to exercise the degree of car[e] a reasonable person would have exercised in the same situation. A prima facie case of negligence requires a showing of 1) duty, 2) breach, 3) actual cause, 4) proximate cause, and 5) damages.

#### DUTY

Every person is under a duty to act as a reasonable person and not expose others to an unreasonable risk of harm.

Here, Carol had a duty to keep her brakes maintained in proper working order to protect her fellow drivers and pedestrians from an unreasonable risk of harm. Furthermore, she had a duty not to expose her dangerous car to others by properly securing it when she left it unattended.

Therefore, Carol owes a duty to Peter.

#### BREACH

A breach is a failure to exercise the degree of due care which a reasonable person would have exercised in the same situation.

Here, Carol breached her duty of due care when she left her car unlocked and keys under the floor mat because anyone could get in her car with poorly maintained breaks [sic].

Therefore, she breached her duty to secure her car.

#### RES IPSA LOQUITUR

Under res ipsa loquitur an inference of negligence is raised when 1) the injury would not have occurred absent negligence, 2) the defendant was in exclusive control over the instrumentality causing the injury, and 3) the plaintiff did not contribute to his own injury.

Here, 1) brakes do not fail unless someone is negligent in their maintenance and 2) Carol was in exclusive control of her car and its maintenance. However, Peter did contribute to his own injury by jumping into Carol's car with no knowledge of its safety.

Therefore, Peter will not be able to use res ipsa.

## ACTUAL CAUSE

A defendant's act is the actual cause of the plaintiff's injury if it would not have occurred but for the defendant's act.

Here, but for Carol leaving her car unlocked and keys under the floor mat Peter would not have been injured.

Therefore, Carol is the actual cause of the Peter's [sic] harm.

## PROXIMATE CAUSE

Proximate cause means that the plaintiff's injury is a direct and natural result of the defendant's act, uninterrupted by unforeseeable intervening act. That [sic] the law will hold the defendant liable for the harm.

Here, it was foreseeable that someone like Peter would drive away in Carol's car after seeing her leave her keys under the floor mat and door unlocked.

Therefore, Carol is the proximate cause of Peter's injuries.

## DAMAGES

Here, Peter was injured when he hit a nearby tree.

Carol will be liable for his general damages, pain and suffering[,] as well as his special damages such as medical bills, and lost wages.

### 2) ISSUE - CONTRIBUTORY NEGLIGENCE?

Conduct of the plaintiff falling below the standard of care for which she is required to conform for her own protection which will bar the plaintiff's recovery.

Here, Peter driving away Carol's car without her consent was unreasonable conduct which fell below the standard of care which she is required to conform for her own protection.

Therefore, Peter will be barred from recovery.

### 3) ISSUE - COMPARATIVE NEGLIGENCE?

Under comparative negligence a plaintiff's recovery will be diminished the amount which his own negligence contributed to the injury.

Here, Peter contributed to his own injuries by driving away Carol's car without her consent.

A court will determine how much his own negligence should diminish his recovery.

Therefore, Peter's recovery will be diminished.

#### 4) ISSUE - ASSUMPTION OF RISK?

When a defendant knows of and appreciates a risk and voluntarily encounters it he may be barred from a recovery.

Here, Carol will argue that Peter knew her car might not be in a safe condition when he voluntarily encountered the risk by driving it away without her consent. However, reasonable people do not cars [sic] to have faulty breaks [sic] and therefore Peter did not know of the risk.

Therefore, this defense will not be successful.

### **CAROL v. PETER**

#### 5) ISSUE - TRESPASS TO CHATTEL?

A trespass to chattel is an intentional interference with the chattel of another without consent or privilege. An act is intentional if done out of a desire or with knowledge of substantial certainty that the result will occur.

Here, Peter acted [sic] intentionally interfered with Carol[']s chattel when he started Carol[']s car and drove it away because he intended to drive it to the hospital. Furthermore, he did not have Carol[']s consent or privilege (infra).

Therefore, Peter is liable to Carol for trespass to chattel and is liable for the cost of repair and reasonable rental value.

#### 6) ISSUE - CONVERSION?

Under tort law, conversion is the exercise of dominion and control over the chattel of another causing a substantial interference with the chattel that the defendant will be forced to pay the full market value of the chattel, a forced sale.

Here, Peter intentionally interfered with Carol[']s chattel as discussed supra. Further he exercised dominion and control by driving the car. If a court finds that the interference was substantial he may be liable under this tort.

Therefore, Peter may be liable for conversion.

#### 7) ISSUE - NECESSITY?

A defendant may be privileged to reasonably interfere with the property rights of another if acting due to an imminent threat and to protect his person or property. However, he is liable for all damage cause[d] due to his interference.

Here, Peter will argue that he was privileged to take Carol's car because he was reasonably acting to protect his wife. This argument will fail because there was no imminent threat to himself or his property which could be mitigated by him taking a car and driving to the hospital.

Therefore, this defense will fail.

#### 8) ISSUE - NEGLIGENCE?

Under tort law, negligence is a failure to exercise the degree of care a reasonable person would have exercised in the same situation. A prima facie case of negligence requires a showing of 1) duty, 2) breach, 3) actual cause, 4) proximate cause, and 5) damages.

#### DUTY

Every person is under a duty to act as a reasonable person and not expose others to an unreasonable risk of harm. Under Palsgraf, Cardozo held that a defendant who creates peril owes a duty to the people who could reasonably be foreseen as being harmed by the peril, the zone of danger.

Here, Peter had a duty to act reasonably in seeking medical attention for his injuries and not creating peril for others in the process.

Therefore, Peter owes a duty to Carol.

#### BREACH

A breach is a failure to exercise the degree of due care which a reasonable person would have exercised in the same situation.

Here, Peter breached his duty when he pulled "the lever of an emergency fire alarm", because this caused the city fire truck to respond to the alarm[,] thereby endangering the safety of the fireman, pedestrians and drivers.

Therefore, Peter breached his duty.

#### ACTUAL CAUSE

A defendant's act is the actual cause of the plaintiff's injury if it would not have occurred but for the defendant's act.

Here, but for Peter pulling the emergency fire alarm Carol would not have been injured.

Therefore, Peter is the actual cause of Carol's harm.

### PROXIMATE CAUSE

Proximate cause means that the plaintiff's injury is a direct and natural result of the defendant's act, uninterrupted by unforeseeable intervening act. That [sic] the law will hold the defendant liable for the harm.

Here, it was foreseeable that a pedestrian, such as Carol, would be injured by the peril created by Peter's negligent act.

Therefore, Peter is the proximate cause of Carol's.

### DAMAGES

Here, Carol was seriously injured.

Peter will be liable for Carol's general damages, pain and suffering as well as her special damages such as medical bills, and lost wages.

### 2) ISSUE - CONTRIBUTORY NEGLIGENCE?

Conduct of the plaintiff falling below the standard of care for which she is required to conform for her own protection which will bar the plaintiff's recovery.

Here, Peter will argue that it [sic] Carol's own negligence[,] discussed supra [,] was a contributing factor to her own injury. However, the link between Carol's negligence and her own injuries is extremely attenuated.

Therefore, this defense will fail.

### 3) ISSUE - COMPARATIVE NEGLIGENCE?

Under comparative negligence a plaintiff's recovery will be diminished the amount which his own negligence contributed to the injury.

Here, Peter will argue that it [sic] Carol's own negligence[,] discussed supra [,] was a contributing factor to her own injury. However, the link between Carol's negligence and her own injuries is extremely attenuated.

Therefore, Carol's recovery will not be diminished.

## ANSWER B TO QUESTION 4

### Carol v. Peter

Carol may assert a negligence claim against Peter.

**Negligence** is conduct which falls below the relevant standard of care established by law for the protection of others against unreasonable risks of harm.

To prove a prima facie case of negligence the plaintiff must prove by a preponderance of evidence that the defendant 1) owed a duty to the plaintiff 2) breached that duty 3) is the actual and proximate cause of the plaintiff's injuries and 4) the injuries resulted in damages.

### Duty?

Duty is the standard of care to act as a reasonably prudent person under same or similar like [sic] circumstances to all for[e]seeable plaintiffs.

Peter was under an emergency to try and get to his wife who was receiving emergency treatment. Peter will be held to such a standard and the jury will decide what is reasonable under these circumstances[.]

Yet, Peter owes a duty to Carol to act reasonable and not cause her any unreasonable risks of harm.

### Breach

Breach of duty occurs when the defendant[']s conduct falls below the established standard of care.

Here, if it was found that Peter should have used caution and not wrecked into a tree then he may have breached a duty to Carol.

### Causation?

Actual cause is found when the defendant's breach is the direct cause or the substantial factor of the plaintiff's injuries. Proximate cause is found when there are no unfor[e]seeable superceding intervening acts which will cut off liability.

Here it was the fire truck which directly hit and injured Carol. Still as Peter's accident and pulling of the alarm is the reason [sic] they were on the scene Peter is the substantial factor.

Also, it is for[e]seeable that when one is in an accident and you pull an alarm that

someone will come to rescue, the fire truck['s] presence is for[e]seeable. Still, it is questionable whether the court will actually find the fact that Carol emerging out of her office resulting in being hit under Peter's for[e]seeable injures (caused by Peter). This may be far too remote and the court will cut off liability under proximate cause.

## **Damages**

General damages may be awarded if the injury resulted in past present future medical bills, lost wages[,] etc.

Carol was injured by the truck seriously[sic], and if the court does not cut off liability under proximate cause then she may recover general damages.

## **Trespass to Chattel?**

Trespass to chattel is when one intentionally interferes with the possessory rights of another over their personal property.

As Peter intended to take Carol's car which she rightfully possessed and he did not gain her consent, he will be liable for the harm incurred by such interference.

## **Conversion**

Conversion is when one intentionally places dominion and control over the personal property which substantially interferes with the possessor['s] ownership.

Here, Peter took Carol's car and wrecked it. He will be held responsible for the harm to the car under trespass to chattel, yet if the car is no longer useable he may be liable for the amount of the full car.

## **Defenses**

### **Negligence**

Contributory and comparative negligence is when the plaintiff's conduct falls below the standard of conduct which one is expected to conform to for his own safety and is a contributing cause to the defendant['s] negligence in bringing about the plaintiff's harm.

Contributory negligence at common law was a total bar to a plaintiff['s] recovery. Comparative, under pure comparative jurisdictions, award damages only if contribution was less than 50% and under all comparative jurisdictions the damages are based on percentages.

Peter will assert the defense that Carol was negligent as to the defective breaks [sic], leaving her keys in the car and emerging out of the office without looking. Discussed more infra...

Carol's damages will be completely barred under contributory negligence and may be deemed as a high percentage as to contribution to her own harm and will be more than 50%, therefore only under comparative negligence she may be awarded any damages, if at all.

### **Trespass to Chattel and Conversion Necessity**

Necessity may be a defense to intentional torts but if it is a private necessity the defendant must pay for any harm done to the property, and cannot have been the factor placing him in the circumstance.

Here, Peter's wife was in emergency treatment and Peter may claim he used the car out of the necessity to get to her. He will however be liable for the damages to the car.

### **Peter v. Carol**

Peter may assert a claim against Carol in negligence.  
Defined supra...  
Duty supra...

Carol owed a duty to the public to not leave her keys in the car. As this was not the cause of Peter's harm this action, conduct will not help Peter's claim.

Still, Carol owes a duty to warn of her deficient breaks [sic] to potential users. As she failed to do so, coupled with the fact of leaving keys in the car she owed a duty to Peter to warn of the bad breaks [sic].

### **Breach**

Defined supra...

When Carol failed to act reasonably and leave her keys in the car knowing her breaks [sic] were bad and that someone may use the car (since it was unlocked) she breached her duty owed to Peter.

### **Causation?**

Defined supra...

The failure of the breaks [sic] were the direct cause of Peter's injuries, and if Carol had not left the door unlocked and keys in the car, or warned (or fixed) of the bad breaks [sic] Peter would not have been hurt. Therefore Carol was a substantial factor.

It is also foreseeable that someone will use the car with bad breaks [sic] if the keys are left in it (possible foreseeable criminal activity) and Carol is the proximate cause.

Carol may argue that Peter's conduct was an intervening act, still as stated above it was foreseeable and Carol is the cause of Peter's injuries.

**Damages**

Supra...

Peter may be awarded damages for his injuries resulting from the accident, and delay by the fire truck hitting Carol.

**Defenses**

Contributing and Comparative

Supra...

As Peter was negligent above under contributory he is completely barred and under comparative he may, less likely, be awarded a small percentage.